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No. —

In the Supreme Court of the United States

OCTOBER TERM, 1945

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

HALLIBURTON OIL WELL CEMENTING COMPANY, A CORPORATION

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Ninth Circuit entered in the above case on December 29, 1945.

OPINIONS BELOW

The opinion of the District Court (R. 24–29) is reported at 57 F. Supp. 408. The majority and dissenting opinions of the Circuit Court of Appeals (R. 480–483) are reported at 152 F. 2d 622.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 29, 1945 (R. 484). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Respondent made agreements with each of its employees specifying a basic hourly rate of pay, with a guaranty of a fixed weekly salary regardless of the number of hours worked. Although respondent's employees generally worked less than 60 hours a week, the specified hourly rate was determined by dividing the employees' weekly salary by 106 ($40+1\frac{1}{2}\times 44$), so that an employee would have to work in excess of 84 hours a week in order to earn additional compensation. The question presented is whether the arbitrary rate of pay specified in the agreement is the "regular rate" of pay upon which overtime compensation is to be computed under Section 7 of the Fair Labor Standards Act of 1938.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C., sec. 201) are as follows:

> SEC. 7 (a). No employer shall, except as otherwise provided in this section, employ

any of his employees who is engaged in commerce or in the production of goods for commerce—

* * * * *

(3) For a workweek longer than forty hours after the expiration of the second year from * * * [the effective] date [of this section],

unless such employee receives compensation for his employment in excess of the hours above specified at a rate of not less than one and one-half times the regular rate at which he is employed.

STATEMENT

Respondent performs various services for persons engaged in the drilling and operation of oil wells (R. 63). This suit relates to the "field employees," consisting of cementers, testers, cement equipment drivers, field mechanics and others (R. 31). Prior to the effective date of the Fair Labor Standards Act, the field employees were paid on a monthly salary basis (R. 13). Shortly after the enactment of the Act, respondent adopted a wage plan essentially similar to the one now in effect (R. 13–17). Except for a brief period (from March 1, 1942, until July 1, 1942, when respondent's field employees were paid a weekly salary and overtime compensation on the basis of a regular rate, computed by divid-

ing hours worked into the weekly salary)[1] (R. 17), the wage plan was essentially as follows:

The employment contract specified a "basic" hourly rate for the first 40 hours of each week and provided for the payment of not less than 1½ times this rate for hours in excess of 40. The contract also guaranteed that each employee would receive weekly, for regular time and overtime, not less than a sum equivalent to 106 times the basic rate (R. 68–70, 401). As explained by respondent, "the basic hourly rate has been fixed so that each employee * * * may work a total of 84 hours in any single workweek before receiving compensation in excess of the guaranteed weekly salary" (R. 314–315).[2]

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[1] Respondent's answer states that the plan set forth in Sec. 12 of the Administrator's Interpretative Bulletin No. 4 was adopted (R. 17). Sec. 12 (R. 235) reads as follows: "If an employee earns $23 per week but works a fluctuating number of hours, his regular rate of pay will be the average hourly rate each week. Suppose that during the course of four weeks the employee works 40, 46, 50, and 41 hours. His regular hourly rate of pay each week is approximately 57.5 cents, 50 cents, 46 cents, and 56.1 cents, respectively. For the first week the employee is entitled to be paid $23; for the second week $24.50 ($23+[6 hours×25 cents]) or ([40 hours×50 cents]+[2 hours×75 cents]); for the third week $25.30 ($23+[10 hours×23 cents]) or ([40 hours×46 cents]+[10 hours×69 cents]); for the fourth week approximately $23.28 ($23+[1 hour×28 cents]) or ([40 hours×56.1 cents]+[1 hour×84 cents])."

After the decision of this Court in *Walling* v. *Belo Corp.*, 316 U. S. 624, respondent reverted to the plan in question here.

[2] On June 25, 1942, respondent advised each employee that "from and after July 1, 1942, your basic rate of pay will

Notwithstanding the contract provisions for a basic hourly rate and a weekly guaranty, the field employees were paid in substantially the same manner as before the Act became effective. Respondent's description of the plan stated that "for the majority of employees * * * the guaranteed weekly salary has been determined by merely reducing each employee's present monthly salary to a weekly figure" (R. 315) and "irregular hour field employees are now working and will continue to work on a monthly minimum salary basis; however, for contract purposes, the monthly salary is reduced to an equivalent weekly salary" (R. 77–78). Employees continued to be paid their monthly salaries on a semimonthly basis (R. 78).

Wage increases and deductions for absences were also considered in terms of monthly salaries. When an increase was effected, the employee was informed that the new contract reflected "his change in salary from his previous monthly rate to the new rate" (R. 108). When an employee was absent from work for such reasons as sickness or "voluntary lay off," the amount by which

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be_____per hour for the first 40 hours each week and that for time over 40 hours each week, you will receive for each hour of work not less than one and one-half times such basic rate * * *, with a guaranty * * * that you shall receive weekly for regular time and for such overtime * * *, a sum not less than $_____" (plf. ex. 1A, R. 68–70, 401).

his pay was reduced was computed, not on the basis of his contract hourly or overtime rate, but on the basis of a proportionate amount of his monthly salary. As directed by respondent: "Reduce the semi-monthly base salary to a daily rate (semi-monthly pay dividend by number of days in that pay period * * *) and multiply by the number of days lost" (R. 110, plf. ex. 4, R. 217–222).

Prior to the institution of this suit, the payroll records showed only the monthly and semimonthly salaries with no provision made for hourly and overtime rates (plf. ex. 3, R. 160–177). Only hours worked in excess of 84 a week were recorded as overtime worked and only the compensation for these hours was recorded as overtime pay (R. 114, 143–144, 160–178). It was admitted that the overtime rate "has no practical use unless the employee works in excess of 84 hours in a single workweek" (R. 316). The guaranteed salary was paid when fewer than 84 hours were worked and whether more or less than 40 hours were worked in a week (R. 160–180). Respondent stated that under the contracts "the employee will receive his minimum weekly wage even when the necessities of the business do not require the employee to work more than a few hours in a given week" (R. 312).

The 84-hour workweek did not represent the regular or usual, or even the average, number of hours worked by the respondent's field employees.

A tabulation of the man-weeks of work performed from July 5, 1942 to March 11, 1944, shows that approximately 80 percent were weeks in which less than 84 hours were worked (R. 226, 384) and that approximately 13 percent were weeks in which less than 40 hours were worked (R. 384). According to respondent's estimates, the average weekly hours of work were considerably less than 84 for all classes of workers, operators averaging 61.6 hours, drivers 62.4 hours, and mechanics 56.5 hours (R. 357–362). On the basis of the average number of hours worked, the average hourly rate received by each class of employee was considerably higher than the overtime rate specified in the contract.

On January 30, 1944, after the institution of this litigation, certain changes were made in respondent's method of compensating its employees. However, the basic practices previously described remained unaltered. One change involved the payment of employees biweekly instead of semi-monthly (R. 115, 180, plf. ex. 3–A, R. 181–182). Payroll records were also revised so that, among other things, they reflected for the first time the hours worked in excess of 40 as overtime hours, as well as the rates allocated to these hours (R. 120, 146, 181–182). One of the incidents of this change was the provision that in connection with deductions for absences "one-seventh of the weekly guarantee may be considered a daily guarantee for the number of working days in the

week" (R. 116), which again averaged "basic" and "overtime" rates.

The District Court, relying on the authority of this Court's decision in *Walling* v. *Belo Corp.*, 316 U. S. 624, held that respondent's wage plan did not violate the overtime requirements of the Act (R. 28, 29, 34) and entered a judgment dismissing the complaint (R. 43–45). On appeal, the Circuit Court of Appeals, Judge Garrecht dissenting, affirmed on the ground that the case presented neither a "substantial distinction" from the *Belo* case nor "any difference in principle" (R. 481). Judge Garrecht stated, however, that in his view the contracts "were for weekly wages, for variable hours. * * * [The] arbitrarily chosen 84-hour week bore no relation to the regular or usual number of hours worked by the employees under consideration. * * * the 'hourly rates' * * * were * * * calculated merely to retain the employer's prestatutory costs" (R. 482–483). To approve such a scheme "would be to encourage circumvention of the statute and its purposes" (R. 483).

REASON FOR GRANTING THE WRIT

1. The court below has decided a Federal question in a way probably in conflict with the decisions of this Court in *Walling* v. *Helmerich & Payne*, 323 U. S. 37, *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419, and *Walling* v. *Harnischfeger Corp.*, 325 U. S. 427. These decisions reemphasized the two-fold pur-

pose of the overtime provisions of the Act: "(1) to spread employment by placing financial pressure on the employer through the overtime pay requirement * * *; and (2) to compensate employees for the burden of a workweek in excess of the hours fixed in the Act." (323 U. S. at 40; see also 325 U. S. at 423–424.) Like the wage plans involved in the above three cases, the guaranteed wage plan here does not satisfy either of these purposes. It enables respondent "to avoid paying real overtime wages for at least the first 40 hours [44 hours in the instant case] worked in excess of the statutory maximum workweek, thus negativing any possible effect such a payment might have had upon the spreading of employment" (323 U. S. at 40–41). Since respondent incurs no additional financial cost until the employee's workweek exceeds 84 hours, there is no incentive to the employer "to reduce the hours of work [to the statutory maximum] and to employ more men." (325 U. S. at 423–424.) And the statutory purpose "of compensating the employees for the burden of a long workweek" (*ibid.*) is equally frustrated, inasmuch as respondent's plan is "so designed as to deprive the employees of their statutory right to receive for all hours worked in excess of the first regular 40 hours one and one-half times the actual regular rate" (323 U. S. at 40). The contract in effect converts the statutory maximum workweek of 40 hours into an 84-hour maximum workweek.

As this Court stated with respect to a similar "vice" in the *Helmerich & Payne* wage plan, "No plan so obviously inconsistent with the statutory purpose can lay a claim to legality" (323 U. S. at 40).

Respondent's wage plan violates not only the statutory purposes, but also "the basic rules for computing correctly the actual regular rate contemplated by Section 7 (a)" (323 U. S. at 40). The "regular rate" specified in respondent's wage plan is not based "upon the wages actually received or upon the hours actually and regularly spent each week in working" (323 U. S. at 41). It is not computed so as to take into account "all payments which the parties have agreed shall be received regularly during the workweek, exclusive of overtime payments" (325 U. S. at 424–425), and which this Court has held must "automatically enter into the computation of the regular rate for purposes of Section 7 (a) regardless of any contract provision to the contrary" (325 U. S. at 432). Respondent's employees regularly receive their full salaries in the frequent workweeks in which they work no overtime, and even in those in which they work considerably less than the statutory maximum number of hours (plf. exs. 3 and 3A, R. 160–182). Neither the designation in respondent's contract nor the evidence that employees sometimes (when more than 84 hours are worked) receive "overtime" compensation based on the contract "regu-

lar" rates can "negative the fact that [respondent's] employees do in fact receive the higher rate" during their non-overtime hours (see 325 U. S. at 430).

Just as the guaranteed piece rates or "incentive bonuses," rather than the contract hourly rates, actually determined the employees' compensation in the *Harnischfeger* and *Youngerman-Reynolds* cases, so the full monthly and weekly salaries in the instant case actually determine the compensation paid respondent's employees for "the normal, nonovertime workweek" (see 325 U. S. at 424). This is demonstrated not only by the fact that the employees regularly receive their full salaries in the frequent workweeks in which they work no overtime, but also by the fact that the monthly or weekly salary, and not the contract "regular" rate, controls the deductions made in weeks in which an employee is voluntarily absent (plf. exs. 4, 4A; R. 217–224). It is clear that the weekly guaranty, not the designated rates, should have been used in determining the regular rate under the statute. As this Court said in the *Youngerman-Reynolds* case (325 U. S. at 424–425), "Once the parties have decided upon the amount of wages and the mode of payment the determination of the regular rate becomes a matter of mathematical computation, the result of which is unaffected by any designation of a contrary 'regular rate' in the wage contracts."

Although the contract here is in some respects similar to that in the *Belo* case, we believe the reliance of the court below on the *Belo* decision was misplaced. In the light of this Court's decisions in the *Helmerich & Payne, Harnischfeger* and *Youngerman-Reynolds* cases, mere similarity in contract form is insufficient to validate an otherwise artificial and unrealistic wage scheme. The *Belo* plan was upheld because the majority of this Court in that case "felt that in fixing a rate of 67 cents an hour the contracts did in fact set the actual regular rate at which the workers were employed" (*Youngerman-Reynolds* case, 325 U. S. at 426). Having found that the hourly rate was in fact genuine and controlling, this Court said that the weekly guaranty was not "inherently inconsistent" with the specified hourly rate but might reasonably be construed as consisting of the specified hourly rate for non-overtime hours and a flexible, fluctuating rate for overtime hours. 316 U. S. at 631. But the *Belo* case does not hold that the recital in a contract of an hourly rate necessarily establishes a genuine hourly rate. Other factors may conclusively show that the weekly salary and not the contract hourly rate is controlling in determining the compensation paid.

Unlike the rates in the *Belo* case, the regular rates here were "fixed * * * at a point completely unrelated to the payments actually and

normally received each week by the employees." (See the *Youngerman-Reynolds* decision, 325 U. S. at 426.) Whatever reason there may have been for holding that the 54½-hour week in the *Belo* case was consistent with the actual facts of employment, clearly here the "84-hour week bore no relation to the regular or usual number of hours worked by the employees under consideration" (dissenting opinion of Judge Garrecht, R. 483). Moreover, the intention of the parties here to set the specified hourly rate as the regular rate cannot be squared with the weekly guaranty, as this Court found it could be in the *Belo* case, on the theory that the guaranty could be construed to provide additional overtime pay in weeks which did not exhaust the guaranty at the stipulated rates. As the dissent below aptly states, "it is fantastic to presume that the weekly wages in those weeks in which [employees] worked only a few hours—much less than 40—might have included extra compensation for overtime" (R. 483).[3] Even in workweeks of more than 40 hours, respondent does not appear to have considered

[3] Examination of the *Belo* record discloses that the $40 weekly guaranty was paid whether more or less than the statutory maximum hours were worked. (*Belo* record 194–337.) However, the significance of these facts was not fully appreciated prior to this Court's decision, and, therefore, the Court's attention was not directed to them. The emphasis in the recent decisions on the compensation paid during non-overtime workweeks as indicative of the actual regular rate of pay demonstrates the importance of such facts.

the guaranty as the payment of additional overtime. The payroll records show a fixed "overtime" rate notwithstanding the contract provision for the payment of overtime at "not less than one and one-half times" the specified hourly rate (R. 120; plf. ex. 3-A, R. 181–182) and contain an entry for "additional compensation per guaranty" where compensation for the hours worked at the specified base and overtime rates did not equal the guaranty (*ibid.*).

2. The decision of the court below is in conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit in *Walling* v. *Uhlmann Grain Co.*, 151 F. 2d 381, which held invalid a wage plan virtually the same as the one here in question.[4] As here, the employment contract in the *Uhlmann* case specified an hourly rate and provided for overtime compensation at 1½ times this rate. To insure the payment of a fixed weekly wage for a fluctuating workweek the contract stated that employees would be subject to call for a specified number of hours and weekly payments were predicated upon the number of hours an employee was subject to call. The employees worked an average

[4] For other circuit court of appeals decisions rejecting similar, artificially fixed "regular rates," see *Watkins* v. *Hudson Coal Co.*, 151 F. 2d 311 (C. C. A. 3), certiorari denied February 4, 1946; *Walling* v. *Alaska-Pacific Consolidated Mining Co.*, 152 F. 2d 812 (C. C. A. 9), petition for certiorari pending; *H. D. Castle Co.* v. *Walling*, 9 Wage Hour Rept. 114 (C. C. A. 5, 1946).

of about 15 hours fewer each week than their "on call" hours and were paid the same weekly salary regardless of the number of hours worked.[5] The employer's books, however, showed the amount paid as composed of both straight and overtime compensation.

In striking down the plan the Circuit Court of Appeals relied upon the decisions of this Court in *Walling* v. *Youngerman-Reynolds Hardwood Co., supra,* and *Walling* v. *Harnischfeger Corp., supra.* It emphasized the facts that (1) the contract rate was predicated upon the number of hours an employee was subject to call, which averaged about 15 more than the hours actually worked and (2) "the amount of compensation received by an employee was the same, irrespective of the number of hours worked" (p. 383). Virtually the same conditions are present here. The "regular" rate is predicated upon an 84-hour workweek although the average workweek is about 24 hours less, and the compensation of the employee is the same irrespective of the hours worked except in the small percentage of workweeks in which more than 84 hours are worked.

In regard to the *Belo* case, the court in the *Uhlmann Grain Co.* case concluded, as a result

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[5] Under the terms of their contracts, employees were supposed to receive additional compensation if required to work in excess of the number of "on call" hours stipulated in the contracts. The number of "on call" hours never exceeded 60.

of this Court's later decisions, that "if the Supreme Court has not repudiated its holding in the *Belo* case, it has come so close as to leave no room for its application except upon an identical state of facts." (151 F. 2d at 383.) The Circuit Court of Appeals for the Ninth Circuit agreed with this statement in *Walling* v. *Alaska-Pacific Consolidated Mining Co.*, 152 F. 2d 812, at p. 814,* but in the instant case the majority has upheld a wage plan which is virtually the same as the *Uhlmann* plan, in reliance upon the *Belo* decision.

3. Since the decision of this Court in the *Belo* case, many employers, like respondent here, have devised compensation contracts which superficially, at least, closely resemble the *Belo* contract. For a period after the *Belo* decision the lower Federal courts tended to uphold such wage plans so long as they specified regular and overtime rates, regardless of the realities of the situations presented. *Atlantic Co.* v. *Walling*, 131 F. 2d 518 (C. C. A. 5); *Green Head Bit & Supply Co.* v. *Walling*, 49 F. Supp. 698 (W. D. Okla.), reversed, 138 F. 2d 453 (C. C. A. 10); *Murray* v. *Noblesville Milling Co.*, 131 F. 2d 470 (C. C. A. 7); *Walling* v. *Alaska-Pacific Consolidated Mining Co.*, 56 F. Supp. 599 (W. D. Wash.), reversed, 152 F. 2d 812 (C. C. A. 9); *Walling* v. *Uhlmann Grain Co.*, 7 Wage Hour Rept. 128 (N. D. Ill.), reversed,

* The Circuit Court of Appeals for the Second Circuit has taken the same view in *Walling* v. *Richmond Screw Anchor Co.*, 9 Wage Hour Rept. 297, decided March 4, 1946.

151 F. 2d 381 (C. C. A. 7); *Walling* v. *Harnischfeger Corp.*, 145 F. 2d 589 (C. C. A. 7), reversed, 325 U. S. 427; *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 145 F. 2d 349 (C. C. A. 5), reversed, 325 U. S. 419; *Walling* v. *Helmerich & Payne*, 138 F. 2d 705 (C. C. A. 10), reversed, 323 U. S. 37; *Walling* v. *Emery Wholesale Corp.*, 49 F. Supp. 192 (N. D. Ga.), affirmed, 138 F. 2d 548 (C. C. A. 5).

This development was arrested by the later decisions of this Court in *Walling* v. *Helmerich & Payne, supra; Walling* v. *Harnischfeger Corp., supra;* and *Walling* v. *Youngerman-Reynolds Hardwood Co., supra.* But the area of continued vitality of the *Belo* decision, if any, is by no means clear. This situation has led to a conflict among the circuits and to uncertainty on the part of employers, employees, and the Administrator. A restatement of the scope of the *Belo* decision, or a reexamination of its doctrine, would seem appropriate to clarify existing uncertainties.

While it is clear that there was no intention in the *Belo* decision to sanction frustration of the overtime policy of the Act, it has become increasingly evident that the *Belo* type of contract by its very nature tends to defeat the purposes of Section 7. To the extent that the *Belo* contract permits work to be performed in excess of the

statutory maximum workweek without entailing any additional wage expense to the employer and additional compensation to the employee, it violates the basic statutory objectives. And insofar as it accepts as valid a specified hourly rate which is not the rate paid for the "normal non-overtime workweek," as, for example, when the weekly guaranty is paid whether more or less than 40 hours are worked in a week, it gives greater weight to nomenclature than to reality. These aspects of the *Belo* contract seem inconsistent in principle with this Court's subsequent opinions.

The nomenclature of the *Belo* contract has been copied by respondent in establishing its 84-hour workweek, but in actual operation the plan does not satisfy the statutory purposes. Respondent's plan illustrates the reliance placed by many employers and by some courts on the *Belo* doctrine to support wage plans which utilize the *Belo* nomenclature but which in actual fact are no less violative of the statutory terms and purposes than were the plans rejected in the three recent decisions of this Court. To avoid the multiplicity of suits resulting from the continued need to litigate the validity of each particular wage plan bearing a resemblance to the *Belo* plan, it is important that the question of the application of the *Belo* decision be settled by this Court. The instant case seems to furnish an appropriate

vehicle for reexamining the scope and doctrine of the *Belo* decision in the light of the "ingenious mathematical manipulations" to which employers have resorted (*Helmerich & Payne* case, *supra,* at p. 41) in the four-year interval since that decision.

Discrimination and unfairness in the operation of Section 7 will result unless the question presented here is settled. Some employers will pay overtime on the basis of the actual regular rates while others, on the basis of the decision here sought to be reviewed, will be enabled to employ workers beyond the statutory maximum workweek without the payment of additional wages. The evil of unfair competition with respect to hours of work and rates of overtime pay will continue without the check which Congress intended.[1]

[1] Congress clearly intended that employees subject to the Act should not be employed in excess of 2,080 hours a year without the payment of additional compensation. Sec. 7 (b) (2), as amended (29 U. S. C., Supp. IV, 207 (b) (2)), permits the requirements of Sec. 7 (a) to be relaxed, in return for a uniform wage upon an annual basis, only pursuant to an agreement which embodies the annual maximum of working hours, "made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board * * *." The pains which Congress took to ensure that the collective bargaining agent was bona fide strongly negative any purpose to give effect to individual contracts designed to relax the requirements of Sec. 7 (a). Under the contracts in this case, an employee may be required to work 4,368 hours a year (84×52) without additional compensation and, of course, there has been no collective bargaining.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

J. HOWARD MCGRATH,
Solicitor General.

WILLIAM S. TYSON,
Solicitor of Labor.

MARCH 1946.